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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	IB Docket No. 95-22
Market Entry and Regulation of	)	RM-8355
Foreign-Affiliated Entities	)	RM-8392

COMMENTS

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SUMMARY

MFSI believes strongly that to encourage the opening of foreign telecommunications markets to U.S.-owned firms, the Commission must broaden its focus in the international arena beyond the traditional correspondent services model to effectively address issues of market access, undue discrimination, and the anti-competitive impact of all types of alliances and relationships between U.S. and foreign international carriers on the competitiveness of the U.S. telecommunications market and implementation of oversight procedures that will ensure that such alliances do not adversely impact the public interest.

In particular, given the potential for anticompetitive conduct against non-allied U.S. carriers by foreign monopoly, duopoly, or otherwise dominant carriers allied with U.S. carriers, MFSI urges the Commission to ensure that its review of foreign carrier affiliations includes a thorough review of the activities of U.S. carriers, including AT&T Corp., that have substantial relationships of any kind with a major foreign carrier, regardless of whether the foreign carrier makes an equity investment in the U.S. carrier. Consistent with this policy, effective immediately, all such alliances must obtain formal Commission approval in accordance with procedures that subject them to public scrutiny and comment. At a minimum, the conditions imposed on MCI as a requirement of participation in the *BT/MCI* alliance should be imposed on any U.S. carrier participating in an alliance with foreign major carriers.

MFSI further urges the Commission to modify its transborder policy to limit Canadian ownership of fiber optic and other wireline facilities in the U.S. to the same minority interest level permitted U.S.-owned firms in Canada, with such restriction to be modified on a reciprocal basis to the extent of relaxation in the Canadian ownership restriction.

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COMMENTS

MFS International, Inc. ("MFSI"), by its undersigned counsel, hereby submits these comments in support of the Commission's proposal to modify its foreign ownership rules and policies so as to promote increased competition in and greater opening of foreign markets to U.S. carriers. MFSI commends the Commission for recognizing the increasingly global nature of the telecommunications industry and its commitment to ensuring that U.S. carriers can participate fully in this new environment. As a new entrant to the international telecommunications market and a beneficiary of the Commission's progressive international policies, MFSI has a direct interest in the opening of foreign markets to U.S.-owned firms.

Based on its experience in the international telecommunications marketplace, MFSI strongly believes that to encourage the opening of foreign telecommunications markets to U.S.-owned firms, the Commission must broaden its focus in the international arena beyond the traditional correspondent services model to effectively address issues of market access, undue discrimination, and the anti-competitive impact of all types of alliances and relationships between U.S. and foreign international carriers on the competitiveness of the U.S. telecommunications market and implementation of oversight procedures that will ensure that such alliances do not have an adverse impact on the public interest. In short, to advance the articulated goals of this proceeding, the Commission must abandon its myopic settlements deficit, cost-based accounting rate approach to regulating the international market and adopt a broader, enlightened approach that assesses the overall competitive impact of its policies.

I. BACKGROUND AND STATEMENT OF INTEREST

MFSI, a corporation organized under the laws of the State of Delaware, is a wholly-owned subsidiary of MFS Communications Company, Inc. ("MFSCC") that is authorized to provide a full range of resold and facilities-based international telecommunications services.[1/] MFSCC, together with its operating subsidiaries, has been a pioneer in the development of competitive and enhanced telecommunications services in the U.S. as well as several foreign markets, bringing the competitive benefits of increased vendor choice, lower prices, and state-of-the-art quality to customers in its markets. Critical to MFSI's business plan for its U.S.-based international services is entering into correspondent and other agreements with many of the foreign monopoly, duopoly, or otherwise dominant carriers newly allied or associated with major U.S. carriers such as AT&T, MCI, and Sprint.

1/ MFSCC's wholly-owned subsidiary, MFS Intelenet, Inc., holds Section 214 authorization permitting it to offer resold International Message Telecommunications Services and international private line services. *See* File Nos. I-T-C-93-154; I-T-C-93-065. Fibernet, Inc., another MFSCC subsidiary, also holds authority to provide facilities-based service to Canada. *See* File No. I-T-C-93-174. MFSCC also has a U.S.-owned foreign subsidiary in the United Kingdom, MFS Communications Limited ("MFSL"). MFSL holds a Public Telecommunications Operator ("PTO") license issued by the United Kingdom Department of Trade and Industry ("DTI") on September 24, 1993, pursuant to § 7 of the Telecommunications Act of 1984. MFSI is also an authorized facilities-based and resale carrier to numerous European countries. *See* File Nos. I-T-C-94-246, DA-94-1189 (Released October 28, 1994). In January 1995, MFSI's U.S.-owned foreign subsidiary, MFS Communications, AB, was granted a Public Telecommunications Operator license pursuant to ¶ 5, § 1, Second Point of the Swedish Telecommunications Act of 1993.

II. THE COMMISSION MUST EXPAND THE SCOPE OF ITS PUBLIC INTEREST EVALUATION TO INCLUDE COMPETITIVE CONCERNS RAISED BY U.S. CARRIER ALLIANCES WITH FOREIGN DOMINANT CARRIERS THAT DO NOT INVOLVE EQUITY INVESTMENTS IN U.S. CARRIERS

The Commission's oversight responsibilities with respect to competitive conditions in the U.S. telecommunications market are not limited to enforcement of statutory foreign ownership restrictions. To fulfill its public interest mandate, the Commission must respond appropriately and decisively to all marketplace changes that threaten to reduce the level of competition in the U.S. international services market (including the recent dramatic combinations of formerly independent competitors in the global telecommunications marketplace) and access to foreign markets by new U.S. carriers.

In particular, given the potential for anticompetitive conduct against non-allied U.S. carriers by foreign monopoly, duopoly, or otherwise dominant carriers allied with U.S. carriers, MFSI urges the Commission to ensure that its review of foreign carrier affiliations includes a thorough review of the activities of U.S. carriers, including AT&T Corp. ("AT&T"), that have substantial relationships of any kind with a major foreign carrier, regardless of whether the foreign carrier makes an equity investment in the U.S. carrier. Consistent with this policy, effective immediately, all such alliances must obtain formal Commission approval in accordance with procedures that subject them to public scrutiny and comment.

In addition to ensuring that affiliated carriers and their alliances will not engage in the traditional forms of anticompetitive conduct, the Commission should approve a U.S. carrier's alliance participation only after a demonstration that the proposed allied foreign carrier's home market is relatively open to competition from U.S. carriers, including a specific finding that correspondent agreements are made freely available to non-allied U.S. carriers without substantial entry barriers such as unnecessary high minimum traffic commitments, technology upgrade or other up-front payments, or delayed transmission of return traffic. Moreover, the U.S. participant must be required to ensure that its foreign partner will make all negotiated accounting rates simultaneously available to all U.S. carriers.

Absent such measures, allied U.S. and foreign carriers will not only be able to provide end-to-end services on advantageous facilities-based terms and conditions, they will severely restrict market entry and expansion by other carriers, such as MFSI, that could provide a competitive spur to lower prices and improve the quality of services available to the public. Purely and simply, the goal of dominant carriers is to preserve market share domestically and internationally, and to maintain excessive revenues from above-cost accounting rates on all their routes for as long as possible. Technological innovations have challenged the cozy hegemony and disrupted the old correspondent-based order, and global alliances are the established players' means of protecting their turf, regardless of the detrimental impact on the public interest. Given the importance of the U.S. market to the success of the alliances, however, the Commission can and must use its delegated authority over U.S. alliance participants as a means of maintaining open competition in the U.S. international services market.

A. Strategic Alliances Among Foreign Dominant Carriers Have an Adverse Impact on Emerging U.S. International Carriers and U.S. Consumers

Recently-formed strategic alliances between major U.S. carriers and major foreign monopoly and duopoly carriers have both substantially diminished the competitive opportunities for new international carriers and substantially increased the barriers new and developing market entrants must face. Even when these alliances are purportedly "non-exclusive," there can be numerous built-in incentives that increase the likelihood that they will become *de facto* exclusive relationships and/or that nonmember carriers will receive inferior treatment. One of the long-standing entry barriers facing new entrants has been difficulty in obtaining foreign correspondent agreements. The on-going international consolidations among established U.S. and foreign carriers have exacerbated the problem, just as emerging U.S. carriers seek broader international roles.

Both the BT/MCI alliance,[2] resulting in the formation of the "Concert" venture, and the proposed Sprint/Deutsche Telekom/France Telecom alliances have acknowledged the Commission's prior approval authority. Moreover, the necessity of maintaining and establishing new correspondent relationships between the foreign venture participants and non-allied U.S. carriers has been formally recognized in their presentations to the Commission.[3] Indeed, in MFSI's experience, France Telecom and Deutsche Telekom have become significantly more amenable to negotiating agreements since Sprint filed for Commission approval of their proposed investment in Sprint. As a result of this new favorable disposition to negotiate, on March 9, 1995, MFSI secured a license from the City of Frankfurt to construct and operate a private network in a limited area of Frankfurt. Accordingly, MFSI urges the Commission to leverage its authority over allied U.S. carriers to encourage foreign carriers such as France Telecom and Deutsche Telekom to negotiate with new carriers equitably without imposing entry fees and/or other unsubstantiated financial commitments.

Significantly, however, AT&T has taken the position that its alliances are outside U.S. regulatory oversight because no foreign investment in AT&T is involved and has deliberately flouted the authority of the Commission and the Department of Justice. The anticompetitive

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[2] *Request of MCI Communications Corporation British Telecommunications PLC, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 9 FCC Rcd. 3960 (1994) ("*BT/MCI*").

[3] *See* Sprint Petition for Declaratory Ruling, File No. ISP-95-002 (filed October 14, 1994).

impact on the U.S. international services market of AT&T's unapproved alliances has already become evident.

Since the formation of AT&T's Uniworld[4/] and WorldPartners[5/] alliances, previously productive and good faith negotiations for correspondent agreements between MFSI and a number of foreign dominant carriers have virtually stalled. Indeed, in one instance, MFSI was expressly informed by an allied monopoly carrier with no direct investment in the U.S. telecommunications industry that it is too costly for that carrier to enter into correspondent agreements with non-allied U.S. carriers, given the existence of the foreign carrier's common enterprise with a U.S. carrier. Interestingly, however, MFSI was further informed that "political pressure" could alter that carrier's position.

Even absent such a clear policy decision against multiple U.S. correspondent agreements, allied foreign carriers may have hidden incentives, such as access to heavily discounted prices for telecommunications equipment, that would cause them to forbear from entering into competitive correspondent agreements with non-allied U.S. carriers who are not in a position to make equivalent side benefits available in exchange for a correspondent agreement. Moreover, even absent such side benefits, because the partners will jointly invest hundreds of millions of dollars in the venture entity, there is a natural incentive present for the equity owner(s) to favor the venture entity over others in which it has no investment. Thus, for

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[4/] Uniworld is an alliance between AT&T and the Unisource consortium of PTT Telecom Netherlands, Telia of Sweden, Swiss Telecom, and Telefonica of Spain. The Uniworld alliance is 60% owned by Unisource and 40% owned by AT&T.

[5/] WorldPartners is an alliance with equity and associated members. Equity members of WorldPartners include AT&T, Kokusai Denshin Denwa Co. Ltd., Singapore Telecom and the Unisource consortium. The alliance's non-equity partners include: Korea Telecom, Telstra Corp. Ltd. of Australia, Hong Kong Telecom, Unitel of Canada (20% owned by AT&T), and Telecom New Zealand.

example, even if WorldPartners' members have no stock or other equity investment in each others' companies, their joint equity interests in the WorldPartners venture certainly create the incentive to discriminate in favor of that venture.

Further, because many of these newly-allied carriers are so dominant that they largely control the telecommunications distribution facilities of their respective home countries, they have the ability to effectively discriminate. In many cases, independent regulatory bodies are non-existent or brand new. They either may not require nondiscriminatory interconnection or correspondent agreements or may not enforce such requirements as do exist. The opportunity for effective discrimination by dominant carriers is also enhanced in many countries by the absence of liberalized restrictions on competitive entry; nondiscriminatory cost accounting and interconnection regulatory regimes; and/or regulations intended to allow the regulator to discover, prevent, and remedy cross-subsidization and anticompetitive leveraging. Where market entry is restricted abroad, only alliances can provide end-to-end, facilities-based and resale services with the advantages of reduced costs and enhanced technical provisioning. When potential new entrants such as MFSI, which provide competitive services, are also foreclosed from competing effectively with the U.S. joint venture partner for services offered on a correspondent basis on allied monopoly-controlled routes, the resulting impact on U.S. consumers is fewer choices of service providers, higher prices, less innovation, and lower quality of service.

B. At a Minimum, the Commission Should Impose the BT/MCI Conditions on U.S. Carriers Allied with Foreign Dominant Carriers

As shown above, even alliances that have not included direct foreign carrier investments in the U.S. market have had a direct and adverse impact on the competitiveness of emerging U.S. international carriers. Significantly, however, the members of such alliances may be receptive to U.S. regulatory oversight requirements that are mandatory on the U.S. partner. Given the adverse impact of strategic alliances among dominant international carriers on the competitiveness of emerging international U.S. carriers like MFSI, the public interest mandates that the Commission require its prior approval of such alliances involving U.S. carriers with substantial shares of the U.S. international traffic prior to their consummation. Further, to the extent the Commission approves such alliances, it should impose whatever regulatory requirements are "necessary . . . to guarantee competing U.S. carriers, and their customers, access on a nondiscriminatory basis to basic services from the parties to the alliances." Critical to Commission approval of any U.S. carrier alliance involving a foreign dominant carrier should be a finding that the members of the alliance will in fact make nondiscriminatory correspondent[6/] agreements available to non-allied U.S. carriers, rather than ignoring or merely paying lip service to the Commission's international settlements policy. Under such a policy, a foreign carrier wishing to ally itself with a U.S.-based carrier will be forced to deal more fairly with new U.S. carriers.

Further, at a minimum, the conditions imposed on MCI as a requirement of participation in the *BT/MCI* alliance should be imposed on any U.S. carrier participating in an alliance with foreign major carriers. Namely, the U.S. carrier should:

- Commit not to accept "special concessions," as evidenced by written agreements with the foreign carrier.[7/]

6/ It would be discriminatory for the foreign allied carrier to, for example, establish facially neutral conditions on correspondent agreements that few, if any, U.S. carriers other than its alliance partner could likely satisfy. Delays in negotiating agreements or inaugurating return of traffic would similarly be evidence of discrimination.

7/ *BT/MCI supra* at ¶ 35. Moreover, it is not enough for the U.S. carrier merely to certify that it has not "bargained for" special concessions, while winking at their known existence. Instead, it must be obligated to ensure that its foreign partner does not make such concessions

- Commit to maintain and make available to the Commission "records on the provisioning and maintenance of facilities and services by the foreign carrier including, but not limited to, services or facilities procured on behalf of customers of the venture offerings.[8]

- Make its monthly circuit status reports of circuits for each route publicly available on a quarterly basis."[9]

- File with the Commission "notification of each additional circuit on the specified routes, specifying the joint owner."[10]

- File with the Commission "quarterly reports of revenue, number of messages and number of minutes of both originating and terminating traffic on each specified route within 30 days from the end of the quarter."

To address the challenging problems of this new world of strategic global alliances, the Commission must concern itself with the overall competitive impact of a proposed alliance of any type on the U.S. international telecommunications services market and cannot turn its attention on and off, depending on the locus of actual investments. Otherwise, major U.S.

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or impose special conditions that discriminate among U.S. carriers. If a major U.S. carrier enters into an alliance with a dominant foreign carrier, it must be obligated to act affirmatively to ensure discriminatory and anticompetitive conduct do not occur.

[8] *E.g.*, "Concert"-type services. *Id.* Moreover, in order to ensure that alliance members are not further advantaged over their new entrant competitors in partially liberalized market segments, they should be required to make leased half-circuits, that would match the new entrant's U.S. half-circuits, available at cost-based rates and to guarantee that such circuits may be converted to market-priced ownership interests, with full credit for prior lease payments, upon liberalization. If such fairly-priced and offered capacity is not made available to new entrants, the alliance must be prohibited from abusing its dominant facilities-based positions at both ends of a route by offering end-to-end services on such routes. The U.S. alliance member should also be denied special facially-neutral "volume and term discounts" on circuit prices that favor the partner over competitive new entrants.

[9] *Id.* at ¶ 39.

[10] *Id.* In this connection, MFSI understands that on some occasions foreign partners have been pressured by their U.S. partners not to make matching circuit capacity available to new international correspondents. Such practices, of course, clearly violate U.S. laws and policies.

carriers and former monopolists such as AT&T, that have the resources to structure alliances and invest hundreds of millions of dollars outside the U.S. without requiring foreign investment in the U.S. company, can undermine the Commission's efforts to increase competition. Such an approach would substantially reduce the Commission's ability to use the leverage of potentially limiting access to the lucrative U.S. market in promoting the opening of foreign markets to U.S. carriers.

III. AT&T SHOULD BE REGULATED AS A DOMINANT CARRIER ON THE UNIWORLD/WORLDPARTNERS ROUTES WHERE IT IS ALLIED WITH FOREIGN CARRIERS THAT CONTINUE TO EXERCISE SUBSTANTIAL CONTROL OVER THEIR HOME MARKET FACILITIES

Despite its flagrant attempt to avoid Commission review of its overseas alliances, AT&T must be subjected to the same (if not greater) scrutiny as foreign carriers seeking to enter or expand their presence in the U.S. market. The Commission has unequivocally established that, for purposes of classifying a U.S. carrier as dominant or nondominant on a particular route, a presumption of dominance will be made if that U.S. carrier has a monopoly affiliate at the foreign end of a given international route.[11] In adopting this presumption of dominance, the Commission reasoned that an affiliated monopoly carrier on the foreign end would have both the incentive and the ability to discriminate against unaffiliated U.S. carriers through its control of bottleneck facilities in the destination country. As discussed above, MFSI's experience

[11] *See* 7 FCC Rcd. at 7334; 47 C.F.R. at 63.10(a)(1)-(3). Affiliation is currently defined to include: a controlling interest by the applicant [for Section 214 authority], or by any entity that directly or indirectly controls or is controlled by [the applicant], or that is under direct or indirect common control with [the applicant], in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or a controlling interest in the applicant by a foreign carrier, or by any entity that directly or indirectly controls a foreign carrier.

demonstrates that the same presumption of dominance extends also to U.S. carriers allied through a common enterprise with a major foreign carrier.

For example, regardless of the fact that under the current definition AT&T may not be deemed an "affiliate" of certain foreign dominant carriers who are members of Uniworld and WorldPartners because of the participation of AT&T with such carriers in a common international telecommunications enterprise, MFSI has been unable to negotiate correspondent voice agreements with such carriers. MFSI understands that dominant carrier regulation on these routes would not alone miraculously force these carriers to enter into correspondent or other agreements with non-allied U.S. carriers. MFSI believes strongly, however, that reimposing full dominant carrier regulation on AT&T on the Uniworld/WorldPartners routes would at least generate more adequate information that the Commission may use in devising appropriate regulatory mechanisms to minimize the impact of any anticompetitive behavior by foreign monopoly carriers.[12/] Such regulations also ensure that AT&T, which still clearly dominates the U.S. market, does not receive more favorable treatment for its alliances than do competing U.S. carriers whose alliances involve foreign investment in the U.S. carrier. Accordingly, MFSI urges the Commission to reimpose full dominant carrier regulation on AT&T on all international routes where it is allied with a major foreign carrier through an alliance, or joint marketing or services agreement, including the Uniworld joint venture and WorldPartners arrangement. Such an approach would also be consistent with the Commission's

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[12/] In this connection, we note that the Commission recently deferred a decision to regulate Cable & Wireless as a non-dominant carrier on the U.S.-Canada route. The Commission deferred the decision because Cable & Wireless holds a majority interest, and Bell Canada's parent company holds a 20% interest, in the second facilities-based carrier (Mercury) which operates in the U.K. and not in Canada. Memorandum Opinion and Order, File Nos. ISP-93-006-ND (released October 21, 1994); ISP-93-007-ND (released October 21, 1994).

policy of promoting comity among sovereign nations that was reflected in the Commission's most recent dominant carrier regulation policy decision, when the Commission decided henceforth to treat U.S.- and foreign-owned carriers similarly, rather than exempting U.S.-owned but not foreign-owned carriers from Commission scrutiny.

Thus, at a minimum, AT&T should be required to obtain Commission approval before adding circuits, be required to file cost support with tariffs on 45 days' notice, and be required to file traffic and revenue reports on a quarterly basis for traffic between the U.S. and the following countries: Sweden, Australia, Canada, New Zealand, Switzerland, Hong Kong, Spain, Japan, Korea, the Netherlands, and Singapore, and any other countries that may join either Unisource, Uniworld or WorldPartners, regardless of any general policy decisions relaxing the dominant carrier regulation to which AT&T has historically been subject.[13/] Allowing AT&T to avoid the level of regulatory oversight applied to a foreign carrier affiliated through a U.S. equity investment would not only adversely affect the competitiveness of the U.S. market but would also signal to foreign regulatory authorities that the Commission's dominant carrier policies do not in fact treat U.S. and foreign dominant carriers equivalently.

[13/] Given AT&T's vigilance in urging the Commission to impose special reporting requirements even on participants in the minuscule international private line resale market, AT&T could hardly deem the suggested requirements to be objectionable, much less burdensome, on a carrier with AT&T's revenues and market share. Order 7 FCC Rcd. 7312 (1992).

IV. THE COMMISSION SHOULD REVIEW AND MODIFY ITS TRANSBORDER POLICY TO LIMIT CANADIAN OWNERSHIP OF NON-RADIO FACILITIES IN THE U.S. TO THE SAME LEVEL THAT U.S. CARRIERS CAN OWN FACILITIES IN CANADA

While MFSI generally supports the Commission's view that a foreign country's regulatory framework need not mirror that of the U.S., MFSI believes that the Commission's mandate to maximize consumer welfare by encouraging competition warrants review and modification of the open entry policy on non-radio facilities-based competition for transborder services. Under the existing U.S. regulatory framework, both Canadian-owned and U.S.-owned carriers are permitted to own fiber optic cable facilities in the U.S. In Canada, however, U.S.-owned carriers may have only a minority investment in wireline facilities. Consequently, by building their own fiber optic facilities in Canada, Canadian-owned carriers can minimize high domestic Canadian contribution charges that would otherwise substantially increase their cost of providing service to their Canadian customers, while U.S.-owned firms that have no provisioning alternatives must pay the contribution charges.[14] This circumstance limits the ability of American-owned service providers operating on both sides of the border to compete on an equal footing with Canadian-owned carriers operating on both sides of the border that may minimize their costs by selective use of their own facilities to distribute their traffic in Canada.

Consistent with other Commission efforts to leverage access to the lucrative U.S. market to promote open access to foreign telecommunications markets, MFSI therefore urges the Commission to review the existing asymmetry in the permitted ownership of non-radio facilities in the Canadian market in light of the overall anticompetitive impact on American-owned

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[14] MFSI understands that some of the Canadian access costs are under review in a Canadian proceeding but, given the statutory nature of the ownership restrictions, the outcome of that proceeding is unlikely to result in a fundamental change in the Canadian ownership rules. *Telecommunications Act*, Section 16, 7,8 (1994).

Canadian service providers. In particular, MFSI urges the Commission to modify its transborder policy to limit Canadian ownership of fiber optic and other wireline facilities in the U.S. to the same minority interest level permitted U.S.-owned firms in Canada, with such restriction to be modified on a reciprocal basis to the extent of relaxation in the Canadian ownership restriction.

V. CONCLUSION

MFSI urges the Commission to use this proceeding to reform its international dominant carrier and market entry and expansion policies so that they can adequately address the dramatic changes in the global marketplace. In particular, MFSI urges the Commission to adopt policies such as those recommended above that maximize consumer welfare by focusing on the overall competitive impact on the U.S. international services market of activities abroad by international carriers that seek to participate in the U.S. telecommunications market, whether through foreign-based alliances or investment in U.S. carriers.

Respectfully Submitted,

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